Mohd Shukur bin Hassan & Anor v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEALS NO 42–9 OF 2000 AND NO 42–10 OF 2000
KAMALANATHAN RATNAM J
16 APRIL 2004

Criminal Procedure — Appeal — Conviction and sentence, against — Accused persons convicted of offence statutory rape — First trial judge suspended mid-way hearing evidence of second appellant — Whether appeals allowed — Whether first trial judge carried out maximum evaluation test — Criminal Procedure (Amendment) Act 1997

Criminal Procedure — Trial — New trial — Accused persons convicted of offence statutory rape — First trial judge suspended mid-way hearing evidence of second appellant — Whether proper to order re-trial against both accused on same charges before another sessions court judge — Criminal Procedure Code s 261

Words and phrases — 'Ceases to exercise jurisdiction therein' — Interpretation of — Criminal Procedure Code (FMS Cap 6) s 261

Initially, the trial was conducted by a sessions court judge, who mid-way through hearing the evidence of the second appellant, ceased to carry on with the trial due to his suspension as a result of being charged for an offence. The first and second appellants were charged for the offence of statutory rape. Both were found guilty and sentenced to ten years imprisonment with five strokes of rotan. Dissatisfied with the decision, they appealed to the High Court. The issues for determination were: (i) whether the suspension of the sessions court judge fell within the meaning of 'ceases to exercise jurisdiction' under s 261 of the Criminal Procedure Code ('the CPC'); (ii) whether proper to order re-trial against both accused on same charges before another sessions court judge by virtue of s 261 of the CPC; and (iii) whether the appeals were allowed by virtue of the amendment to the CPC.

Held, allowing the appeals and setting aside the conviction:

(1) In *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 168, the case only referred to death, retirement or resignation. However, the decision in *Goh Chooi Guan* should not to be taken as excluding all other possible causes that could prevent one magistrate or sessions court judge from continuing with a case and thus requiring another to take over. The category should not be deemed closed. Therefore, it was proper to include 'suspension' into this category (see paras 5–6); *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 168 distinguished.

(2) Section 261 of the CPC had been rightly invoked in this case and the High Court judge agreed with the proposition of the law. Since this case was related to charges involving statutory rape, it was all the more important and relevant for the final arbiter to be in a position to weigh the evidence taken together with considerations of demeanour and the

general conduct and management of the witnesses in court, especially the complainant. Deprived of the opportunity of availing himself of such considerations, it could not be said that both the accused have had a fair hearing before the second judge who merely had the opportunity to see words in cold hard print. Therefore, in the interest of justice, the High Court judge ordered a re-trial against both the accused on the same charges before another sessions court judge (see paras 8, 12); *Public Prosecutor v Mohd Jon* [1993] 1 MLJ 133 followed.

(3) An important factor that weighed heavily in favour of allowing these appeals was the fact that these charges related to offences committed before the amendment to the CPC. The CPC (FMS Cap 6) which was amended on 30 January 1997 by the Criminal Procedure (Amendment) Act 1997 ('the amendment') to provide for a prima facie standard of proof at the close of the case of the prosecution. Thus, the test that had to be adopted by the first sessions court judge in evaluating the prosecution's evidence before calling upon both the accused to enter into their defence should have been proof beyond reasonable doubt. Both their defences were called on 31 March 1997 according to the record of appeal. Since *Arulpragasan* was decided on 27 July 1996, it had become the law then to apply the maximum evaluation test. The first sessions court judge who was suspended did not state which test he applied in calling for the defence (see paras 10–11); *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 and *Bahruni bin Ismail v Public Prosecutor* [1997] 2 MLJ 265 followed.

[**Bahasa Malaysia summary**

Pada mulanya, perbicaraan telah dikendalikan oleh seorang hakim mahkamah sesyen, yang setengah jalan mendengar perbicaraan keterangan perayu kedua, telah digugurkan daripada meneruskan perbicaraan tersebut kerana penggantungan beliau akibat dituduh kerana satu kesalahan. Perayu-perayu pertama dan kedua telah dituduh kerana kesalahan rogol statutori. Kedua-duanya didapati bersalah dan dihukum sepuluh tahun penjara dengan lima sebatan rotan. Berasa tidak puas hati dengan keputusan tersebut, mereka telah merayu ke Mahkamah Tinggi. Persoalan-persoalan yang perlu ditentukan adalah: (i) sama ada penggantungan hakim mahkamah sesyen tersebut terangkum dalam maksud 'ceases to exercise jurisdiction' di bawah s 261 Kanun Acara Jenayah ('KAJ'); (ii) sama ada ia betul untuk memerintahkan satu perbicaraan semula terhadap kedua-dua tertuduh atas pertuduhan yang sama di hadapan seorang hakim mahkamah sesyen lain menurut s 261 KAJ; dan (iii) sama ada rayuan-rayuan tersebut dibenarkan bersesuaian dengan KAJ.

Diputuskan, membenarkan rayuan-rayuan dan mengenepikan sabitan:

(1) Dalam *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 168, kestersebut hanya merujuk kepada kematian, persaraan atau

perletakan jawatan. Namun begitu, keputusan dalam *Goh Chooi Guan* tidak boleh dianggap sebagai mengecualikan semua sebab yang mungkin yang boleh menghalang seorang majistret atau hakim mahkamah sesyen daripada meneruskan suatu kes dan dengan itu memerlukan seorang lain untuk mengambil alih. Kategori tersebut tidak sepatutnya ditutup. Oleh itu, ia adalah betul untuk memasukkan 'suspension' dalam kategori ini (lihat perenggan-perenggan 5–6); *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 168 dibeza.

(2) Memandangkan kes ini berkaitan dengan pertuduhan-pertuduhan yang melibatkan rogol statutori, ia adalah lebih penting dan relevan lagi untuk pengadil terakhir berada dalam kedudukan untuk menimbangkan keterangan yang diambil bersama dengan pertimbangan-pertimbangan tentang perilaku dan perbuatan dan pengendalian saksi-saksi di mahkamah, terutamanya pengadu. Terkilankan peluang menawarkan dirinya terhadap perimbangan sedemikian, ia tidak boleh dikatakan bahawa kedua-dua tertuduh telah ada perbicaraan yang adil di hadapan hakim kedua yang hanya mempunyai peluang untuk melihat perkataan-perkataan tersebut secara tulisan sahaja. Oleh itu, demi kepentingan keadilan, hakim Mahkamah Tinggi memerintahkan satu perbicaraan semula terhadap kedua tertuduh atas pertuduhan yang sama di hadapan hakim mahkamah sesyen lain (lihat perenggan-perenggan 8, 12); *Public Prosecutor v Mohd Jon* [1993] 1 MLJ 133 diikut.

(3) Satu faktor penting yang berat menyebelahi dalam membenarkan rayuan-rayun tersebut adalah hakikat bahawa pertuduhan-pertuduhan tersebut berkaitan kesalahan-kesalahan yang dilakukan adalah sebelum pindaan kepada KAJ. KAJ (FMS Bab 6) yang telah dipinda pada 30 Januari 1997 oleh Akta (Pindaan) Acara Jenayah 1997 ('pindaan tersebut') untuk memperuntukkan satu bukti standard prima facie di penutup kes pendakwaan. Oleh itu, ujian yang patut digunakan oleh hakim mahkamah sesyen semasa meneliti keterangan pendakwaan sebelum memanggil kedua-dua tertuduh untuk memasukkan pembelaan mereka hendaklah merupakan bukti melampaui keraguan munasabah. Kedua-dua pembelaan mereka telah dipanggil pada 31 Mac 1997 menurut rekod rayuan. Memandangkan *Arulpragasan* telah diputuskan pada 27 Julai 1996, ia telah menjadi undang-undang untuk menggunakan ujian penilaian maksima. Hakim mahkamah sesyen pertama yang telah digantung tersebut tidak menyatakan ujian mana yang beliaugunakan semasa memanggil pembelaan (lihat perenggan-perenggan 10–11); *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 dan *Bahruni bin Ismail v Public Prosecutor* [1997] 2 MLJ 265 diikut.]

Notes

For cases on new trials, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4110–4143.

For cases on appeals against conviction and sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 221–231.
For change of judges during hearing, see 18 *Halsbury's Laws of Malaysia* para [310.335].

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Bahruni bin Ismail v PP [1997] 2 MLJ 265 (folld)
PP v Goh Chooi Guan [1978] 2 MLJ 168 (distd)
PP v Mohd Jon [1993] 1 MLJ 133 (folld)

Legislation referred to

Criminal Procedure Code s 261

Karpal Singh (Jagdeep Singh and Simon Murali with him) (Karpal Singh & Co) for the appellants.
Tn Yusob bin Md Tasir, DPP for the prosecution.

Kamalanathan Ratnam J:

The case

[1] The first appellant faced two charges of statutory rape. He was found guilty and sentenced to ten years imprisonment with five strokes of the rotan on each of the two charges to run concurrently. The second appellant faced a similar charge. He too was found guilty and also sentenced to ten years imprisonment with five strokes of the rotan. Dissatisfied with that decision they appealed to this court.

Findings of the court

[2] The trial was initially conducted by a sessions court judge who heard the entire prosecution's case and then called upon both the accused to enter into their defence. He heard the first appellant's evidence and mid-way through hearing the evidence of the second appellant he ceased to carry on with the trial as he was suspended as a result of being charged for an offence.

[3] Mr Karpal Singh questioned whether s 261 of the Criminal Procedure Code ('CPC') had been complied with. Section 261 of the CPC reads as follows:

> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial.
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> Provided as follows:
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> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard ;

A (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

B **[4]** Counsel's argument was that the suspension of the sessions court judge did not fall within the meaning of 'ceases to exercise jurisdiction'. He relied upon the decision in *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 168. In that case, Syed Agil Barakbah J (as he than was) said at p 170 as follows:

C The clause 'cease to exercise jurisdiction therein' requires a proper construction having regard to the surrounding circumstances. A Magistrate ceases to exercise jurisdiction in a criminal case by his untimely death, retirement or resignation. In all these cases, he will not be able to continue hearing any case part-heard by him. The succeeding Magistrate will therefore have to act according to the requirement of the section. However, in the case of a transfer to another State in the same or similar post, I do not think the section applies. Although section 9 of the Criminal Procedure Code and section 59(2) of the Subordinate Courts Act 92 provide local limits of jurisdiction of Sessions Court, a President who is gazetted as such for the whole of West Malaysia, is empowered to continue the hearing of a case part-heard by him prior to his transfer. In the case of a Magistrate, the proviso of sub-section (2) of section 76 of the same Act accords him with jurisdiction to continue with such trial by virtue of his appointment duly gazetted in the former State. This is in accord with the principle that having seen and heard the witnesses they are the best persons to continue and complete the case in the interest of justice and with a view to ensuring a speedy trial.

F **[5]** Noting that the said case only referred to death, retirement or resignation, Mr Karpal Singh questioned whether it was proper to include suspension.

[6] To my mind, the decision in *Goh Chooi Guan* ought not to be taken as excluding all other possible causes that could prevent one magistrate or sessions court judge from continuing with a case and thus requiring another to take over. The category cannot be deemed closed. I would also include 'suspension' into this category and reject this argument.

[7] However on the issue raised as to whether s 261 had been rightly invoked in this case, there is merit in Mr Karpal's submission. In *Public Prosecutor v Mohd Jon* [1993] 1 MLJ 133, Richard Malanjum JC (as he then was) said at p 138 as follows:

I The provision in s 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and

credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved.

[8] I agree with this proposition of the law. Since this case relates to charges involving statutory rape, it is all the more important and relevant for the final arbiter to be in a position to weigh the evidence taken together with considerations of demeanour and the general conduct and management of the witnesses in court, especially the complainant. Deprived of the opportunity of availing himself of such considerations, it cannot be said that both the accused have had a fair hearing before the second judge who merely had the opportunity to see words in cold hard print.

[9] Another important factor that weighed heavily in favour of allowing these appeals was the fact that these charges related to offences committed before the amendment to the CPC. The CPC (FMS Cap 6) was amended on 30 January 1997 by the Criminal Procedure (Amendment) Act 1997 to provide for a prima facie standard of proof at the close of the case of the prosecution. This was because of the need to amend the law to overcome the majority view of the Federal Court in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 which had held that the duty of the prosecution at the end of its case was to prove a case beyond reasonable doubt. It must also be noted that in *Bahruni bin Ismail v Public Prosecutor* [1997] 2 MLJ 265, the Federal Court had held that the amendment which came into force on 31 January 1997 had no retrospective effect in that the amendment would only be applicable to cases filed after that date.

[10] Since both charges against the first appellant were alleged to have been committed on 27 and 28 November 1995 and as against the second appellant on 27 November 1995, the test that had to be adopted by the first sessions court judge in evaluating the prosecution's evidence before calling upon both the accused to enter into their defence should have been proof beyond reasonable doubt. Both their defences were called on 31 March 1997 according to the record of appeal. Since *Arulpragasan* was decided on 27 July 1996, it had become the law then to apply the maximum evaluation test.

[11] Perusing the notes of evidence, I find that the first sessions court judge who was suspended did not state which test he applied in calling for the defence.

[12] In the circumstances, I felt that in the interest of justice, I ought to allow the appeals and set aside the conviction. However, I ordered a re-trial against both the accused on the same charges. I also ordered that both the accused be produced before another sessions court judge that afternoon at

Butterworth and set bail at RM10,000 each in one surety to be extended up to that afternoon when both the accused would be produced before the court.

Appeals allowed and conviction set aside.

Reported by Ezatul Zuria Azhari